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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9 KATRINA NICOLE KERBS,

10 Plaintiff,

11 v.  
12

13 CAROLYN W. COLVIN,  
14 Commissioner of Social Security,

15 Defendant.  
16

No. 2:14-CV-0127-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

17 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF  
18 No. 12, 13. Attorney Dana C. Madsen represents Katrina Nicole Kerbs (Plaintiff);  
19 Special Assistant United States Attorney Jordan D. Goddard represents the  
20 Commissioner of Social Security (Defendant). The parties have consented to  
21 proceed before a magistrate judge. ECF No. 17. After reviewing the  
22 administrative record and briefs filed by the parties, the Court **GRANTS**  
23 Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for  
24 Summary Judgment.

25 **JURISDICTION**

26 Plaintiff filed an application for Supplemental Security Income (SSI)  
27 benefits on May 17, 2010, alleging disability since July 15, 2009, due to  
28 myasthenia gravis. Tr. 206, 225. Plaintiff amended the alleged onset date to May

17, 2010, at the administrative hearing. Tr. 41. The SSI application was denied initially and upon reconsideration. Administrative Law Judge (ALJ) R. J. Payne held a hearing on May 26, 2011, Tr. 39-89, and issued an unfavorable decision on June 8, 2011, Tr. 102-116. However, the Appeals Council remanded the matter for additional proceedings on August 30, 2012. Tr. 117-120. The Appeals Council directed the ALJ to obtain evidence from a vocational expert to clarify the effect of the assessed limitations on Plaintiff's occupational base. Tr. 118. The ALJ held a hearing on January 25, 2013, Tr. 90-99, and issued another unfavorable decision on February 11, 2013, Tr. 19-28. The Appeals Council denied review on March 13, 2014. Tr. 1-6. The ALJ's February 2013 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on May 5, 2014. ECF No. 1, 3.

### STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcript, the ALJ's decision, and the briefs of the parties. They are only briefly summarized here.

Plaintiff was born on July 15, 1990, and was 19 years old on the May 17, 2010, amended alleged onset date. Tr. 40. Plaintiff is a high school graduate and was attending college full-time at the time of the first administrative hearing. Tr. 60-64. Plaintiff testified she had not missed any days of school since beginning her coursework. Tr. 67. On "bad days" she would have her mother drive her to school, but this had occurred only three times during the school year. Tr. 79. In December 2011, it was reported she had graduated from college as a floral designer. Tr. 436. Plaintiff reported she has never worked. Tr. 225.

At the administrative hearing held on May 26, 2011, Mihn Vu, M.D., testified that Plaintiff had been diagnosed with myasthenia gravis, a rare disease where the connection between a patient's nerves and muscles can be blocked and

1 may result in paralysis. Tr. 45-46. Dr. Vu opined Plaintiff would be capable of  
 2 performing light exertion level work, but would not be able to do the type of work  
 3 requiring continuous activity and would need a five to 10 minute break every two  
 4 hours. Tr. 50-51, 56-57.

### 5 STANDARD OF REVIEW

6 The ALJ is responsible for determining credibility, resolving conflicts in  
 7 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
 8 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
 9 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
 10 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
 11 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
 12 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
 13 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
 14 another way, substantial evidence is such relevant evidence as a reasonable mind  
 15 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
 16 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
 17 interpretation, the Court may not substitute its judgment for that of the ALJ.  
 18 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169  
 19 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by substantial  
 20 evidence will be set aside if the proper legal standards were not applied in  
 21 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
 22 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence  
 23 supports the administrative findings, or if substantial conflicting evidence supports  
 24 a finding of either disability or non-disability, the ALJ's determination is  
 25 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### 26 SEQUENTIAL EVALUATION PROCESS

27 The Commissioner has established a five-step sequential evaluation process  
 28 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),

1 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one  
2 through four, the burden of proof rests upon the claimant to establish a prima facie  
3 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This  
4 burden is met once a claimant establishes that a physical or mental impairment  
5 prevents him from engaging in his previous occupation. 20 C.F.R. §§  
6 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the  
7 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that  
8 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist  
9 in the national economy which claimant can perform. *Batson v. Commissioner of*  
10 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make  
11 an adjustment to other work in the national economy, a finding of “disabled” is  
12 made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 13 ADMINISTRATIVE DECISION

14 On February 11, 2013, the ALJ issued a decision finding Plaintiff was not  
15 disabled as defined in the Social Security Act. At step one, the ALJ found Plaintiff  
16 had not engaged in substantial gainful activity since May 17, 2010, the application  
17 date. Tr. 21. At step two, the ALJ determined Plaintiff had the severe impairment  
18 of myasthenia gravis. Tr. 21. At step three, the ALJ found Plaintiff did not have  
19 an impairment or combination of impairments that met or medically equaled the  
20 severity of one of the listed impairments. Tr. 22.

21 The ALJ assessed Plaintiff’s residual function capacity (RFC) and  
22 determined she could perform a range of sedentary exertion level work. Tr. 22.  
23 The ALJ indicted Plaintiff could only walk for 30 minutes, stand for 30 minutes  
24 and sit for two hours at a time; needs to be able to alternate from sitting to standing  
25 every two hours for a period of five minutes or less; can do frequent pushing and  
26 pulling within the lifting limits; can occasionally climb, balance, stoop, kneel,  
27 crouch or crawl; can never climb ropes, ladders or scaffolds; should avoid even  
28 moderate exposure to extreme temperatures and hazards; can frequently handle,

1 finger, reach and feel; and would be able to remain reasonably attentive in a work  
2 setting despite the fact that she takes medication for mild to moderate, occasional  
3 to frequent pain. Tr. 22.

4 The ALJ determined at step four that Plaintiff has no past relevant work. Tr.  
5 26. At step five, the ALJ concluded that, considering Plaintiff's age, education,  
6 work experience and RFC, and based on the testimony of the vocational expert,  
7 there were jobs that exist in significant numbers in the national economy Plaintiff  
8 could perform, including the jobs of cashier II, assembly/bench hand, and call out  
9 operator. Tr. 26-27. The ALJ thus concluded Plaintiff was not under a disability  
10 within the meaning of the Social Security Act at any time from May 17, 2010,  
11 through the date of the ALJ's decision, February 11, 2013. Tr. 27-28.

## 12 ISSUES

13 The question presented is whether substantial evidence supports the ALJ's  
14 decision denying benefits and, if so, whether that decision is based on proper legal  
15 standards. Plaintiff contends the ALJ erred by (1) improperly discrediting her  
16 symptom claims; and (2) failing to properly consider and weigh the expert opinion  
17 evidence.

## 18 DISCUSSION

### 19 A. Plaintiff's Credibility

20 Plaintiff contests the ALJ's adverse credibility determination in this case.  
21 ECF No. 12 at 10-12.

22 It is the province of the ALJ to make credibility determinations. *Andrews v.*  
23 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be  
24 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231  
25 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying  
26 medical impairment, the ALJ may not discredit testimony as to the severity of an  
27 impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157  
28 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the

1 ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and  
2 convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*  
3 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:  
4 rather the ALJ must identify what testimony is not credible and what evidence  
5 undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*,  
6 12 F.3d 915, 918 (9th Cir. 1993).

7 In this case, the ALJ found Plaintiff's medically determinable impairments  
8 could reasonably be expected to cause some of the alleged symptoms; however,  
9 Plaintiff's statements concerning the intensity, persistence and limiting effects of  
10 these symptoms were not credible or persuasive to the extent they were  
11 inconsistent with the ALJ's RFC determination. Tr. 24.

12 The ALJ first determined Plaintiff's demonstrated ability to participate in  
13 college classes five days a week weakened her position that her ability to work is  
14 limited and that she is totally disabled. Tr. 24. The Ninth Circuit has held that  
15 taking college courses is an activity which is inconsistent with an alleged inability  
16 to perform work. *McGroarty v. Apfel*, 188 F.3d 514 (9th Cir. 1999); *Matthews v.*  
17 *Shalala*, 10 F.3d 678, 680 (9th Cir. 1993) (attending school three days a week is an  
18 activity inconsistent with an alleged inability to perform all work).

19 While Plaintiff avers the ALJ misstated the record by asserting she was  
20 taking collegiate level courses five days a week, ECF No. 14 at 3, Plaintiff testified  
21 at the administrative hearing that she did, in fact, attend two classes on Mondays,  
22 Tuesdays, Thursdays and Fridays and three classes on Wednesdays, Tr. 64, and  
23 had never missed a class, Tr. 67. Contrary to Plaintiff's assertion, Plaintiff was  
24 attending college classes five days a week. Plaintiff's demonstrated ability to  
25 successfully navigate college coursework five days a week was a valid reason for  
26 the ALJ to find her subjective complaints less than fully credible.

27 The ALJ next stated the objective medical evidence did not support the level  
28 of impairment Plaintiff alleged. Tr. 24. The ALJ indicated the medical evidence

1 did not support the degree of limitations and perpetual restrictions described by  
2 Plaintiff at the hearing. Tr. 24. A lack of supporting objective medical evidence is  
3 a factor which may be considered in evaluating a claimant's credibility, provided it  
4 is not the sole factor. *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9th Cir. 1991).

5 As noted by the ALJ, there are no treating source opinions from the relevant  
6 time period "opining greater restrictions than what are described in the [ALJ's]  
7 residual functional capacity" determination. Tr. 24. Medical expert Vu testified  
8 Plaintiff's condition had been treated and well controlled, except for a January  
9 2011 incident Dr. Vu attributed to Plaintiff not using her medication as instructed.  
10 Tr. 24-25, 47-48. Dr. Vu opined Plaintiff could perform a full range of light  
11 exertion level work with a limitation on continuous activity and the need for a five-  
12 minute break every two hours. Tr. 25, 50-51, 56-57. The ALJ adopted Dr. Vu's  
13 opinion with the exception of finding the record supported an RFC determination  
14 of only sedentary exertional level work, consistent with the State Agency  
15 reviewing physicians' opinions. Tr. 25, 378-386. While the doctors of record  
16 disagreed about whether Plaintiff should be limited to work at the light exertion  
17 level, Tr. 49-53, or sedentary exertion level, Tr. 49, 378-386, all doctors who  
18 offered an opinion regarding Plaintiff's RFC indicated Plaintiff was capable of  
19 maintaining full-time work and her condition had generally improved over time,  
20 Tr. 46-49, 386. The ALJ properly concluded that the objective medical evidence  
21 did not support limitations to the extent claimed by Plaintiff.

22 The ALJ also held that Plaintiff's daily activities were inconsistent with her  
23 allegations of disabling symptoms and limitations. Tr. 24. It is well-established  
24 that the nature of daily activities may be considered when evaluating credibility.  
25 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

26 The ALJ indicated Plaintiff was able to rake leaves, hike, camp, spend the  
27 day at the fair walking all over, and participate in the color guard. Tr. 24. The  
28 record reflects that Plaintiff informed Pat Hesselgesser, ARNP, on November 16,



1 2010, that she “was raking and could not grip the ra[k]e any longer,” but that the  
2 episode was “very brief” and “she recovered quickly.” Tr. 387. It was noted that  
3 Plaintiff “showed excellent recovery and improvement in her mild exacerbation.”  
4 Tr. 389. At the administrative hearing held on May 26, 2011, Plaintiff testified she  
5 went camping for three days in August of 2010. Tr. 82-84. On September 12,  
6 2011, Ms. Hesselgesser indicated Plaintiff reported a general sense of weakness  
7 “after spending the entire day at the fair . . . walking all over the Fairgrounds.” Tr.  
8 423. On March 23, 2012, Plaintiff reported to Ms. Hesselgesser she had been  
9 doing well with no signs of weakness, but had experienced pain in the right  
10 forearm from her work as a color guard where she marches with a flag and  
11 performs maneuvers with the flag. Tr. 444.

12 While one does not need to be “utterly incapacitated” to be disabled, *Fair*,  
13 885 F.2d at 603, the ALJ appropriately determined Plaintiff’s documented  
14 activities of raking, hiking, camping, spending an entire day walking at the fair,  
15 and participating in the color guard are inconsistent with her allegation that she is  
16 not able to work.

17 Lastly, the ALJ indicated Plaintiff’s was less than fully credible because the  
18 evidence of record showed that Plaintiff was not particularly motivated or  
19 interested in working. Tr. 24. The Ninth Circuit has recognized that the ALJ may  
20 properly consider the issue of motivation in assessing credibility. *Matney v.*  
21 *Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992); *Tommasetti v. Astrue*, 533 F.3d  
22 1035, 1040 (9th Cir. 2008) (finding an ALJ may draw reasonable inferences  
23 regarding a claimant’s motivation to work).

24 While Plaintiff contends in her reply brief that the ALJ did not rely on her  
25 alleged reluctance to return to work due to insurance concerns as a ground for  
26 credibility, ECF No. 14 at 4, the record shows to the contrary, *see* Tr. 24. The ALJ  
27 specifically noted Plaintiff indicated in December 2011 that she was reluctant to  
28 work because she would lose her insurance. Tr. 24, 436. The ALJ held that this



1 evidence indicates Plaintiff is not particularly motivated or interested in working,  
2 which calls into question whether it is her impairments or her lack of desire to  
3 work that caused her to seek disability. Tr. 24. The ALJ's finding that Plaintiff's  
4 poor motivation undermined her credibility is supported by the record.

5 The ALJ is responsible for reviewing the evidence and resolving conflicts or  
6 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
7 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in  
8 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in  
9 determining whether the ALJ's decision is supported by substantial evidence and  
10 may not substitute its own judgment for that of the ALJ even if it might justifiably  
11 have reached a different result upon de novo review. 42 U.S.C. § 405(g). After  
12 reviewing the record, the Court finds that the reasons provided by the ALJ for  
13 discounting Plaintiff's subjective complaints are clear, convincing, and fully  
14 supported by the record. Accordingly, the ALJ did not err by concluding that  
15 Plaintiff's subjective complaints and alleged limitations were not entirely credible  
16 in this case.

#### 17 **B. Step Five**

18 Plaintiff lastly contends that the ALJ erred because "[b]oth vocational  
19 experts indicated that competitive full-time employment could not accommodate"  
20 a schedule where the individual would need to take five to 10 minutes breaks every  
21 two hours, a limitation Dr. Vu assessed and the ALJ adopted in his RFC  
22 determination. ECF No. 12 at 13.

23 At the administrative hearing held on May 26, 2011, Dr. Vu testified that  
24 Plaintiff would be capable of performing light exertion level work, but would not  
25 be able to do the type of work requiring continuous activity and would need a five  
26 to 10 minute break every two hours. Tr. 50-51, 56-57. The ALJ accorded "great  
27 weight" to Dr. Vu's opinion, Tr. 25, and determined Plaintiff retained the RFC to  
28 perform a range of sedentary exertion level work that was not inconsistent with Dr.

1 Vu's opinion, Tr. 22. At the January 25, 2013, administrative hearing, Deborah  
2 Lapoint, a certified vocational expert, Tr. 181-182, testified that an individual with  
3 the limitations assessed by the ALJ would be able to perform jobs that exist in  
4 significant numbers in the national economy, including the jobs of cashier II,  
5 assembly/bench hand, and call out operator. Tr. 94-97.

6 The ALJ accorded weight to the testimony of the certified vocational expert  
7 and thus determined there were sedentary exertion level jobs that exist in  
8 significant numbers in the national economy that Plaintiff could perform. Tr. 26-  
9 27. The ALJ's conclusion in this regard is fully supported by the evidence of  
10 record.

11 While Plaintiff submits that an April 2012 report and "vocational opinion"  
12 from an individual identified as a "certified vocational evaluation specialist"  
13 provides support for her allegation that she is not gainfully employable, Tr. 280-  
14 282, the individual's resume and credentials are not a part of the record. The  
15 individual's qualifications to provide an opinion as a vocational expert are thus  
16 uncertain. Of greater significance, this individual was not provided a hypothetical  
17 which specifically reflected the ALJ's ultimate RFC determination in this case. In  
18 any event, the opinion expressed was not as definitive on the issue of  
19 employability as alleged by Plaintiff. The opinion stated merely that "the need to  
20 have a 5 to 10-minute break every two hours, on a more probable than not basis,  
21 would impact her ability to be gainfully employed. Many work situations do not  
22 allow for scheduled breaks." Tr. 282. The opinion did not elaborate on the  
23 asserted impact or specify what type of jobs would not allow scheduled breaks.  
24 The April 2012 vocational opinion, Tr. 280-282, is not entitled to weight in this  
25 matter.

26 The Court finds the ALJ's step five determination is supported by substantial  
27 evidence and free of legal error.

28 ///

**CONCLUSION**

Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision in this case is supported by substantial evidence and free of legal error. Accordingly, **IT IS ORDERED:**

1. Defendant's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant** and the file shall be **CLOSED**.

DATED November 30, 2015.



A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE